UNITED
NATIONS

A

Distr.
GENERAL

A/CN.9/458/Add.4
5 February 1999

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Thirty-second session
Vienna, 17 May - 4 June 1999

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

Draft chapters of a legislative guide on privately financed infrastructure projects

Report of the Secretary-General

Addendum

Chapter III. SELECTION OF THE CONCESSIONAIRE

	Paragraph	Page
Legislative recommendations	-	3
Notes on legislative recommendations	1-141	10
Section		
A. General considerations	1-38	10
1. Selection procedures covered by the *Guide*	3-5	10
2. General objectives of selection procedures	6-18	11
3. Special features of selection procedures for privately financed infrastructure projects	19-30	14
4. Preparations for selection proceedings	31-38	17
B. Preselection of bidders	39-56	19
1. Invitation to the preselection proceedings	40-42	19
2. Preselection criteria	43-46	20
3. Issues relating to the participation of bidding consortia	47-48	21

V.99-81058

	Paragraph	Page
4. Preselection and domestic preferences	49-50	22
5. Contribution towards costs of participation in selection proceedings	51-52	23
6. Preselection proceedings	53-56	23
C. Procedures for requesting proposals	57-94	24
1. Phases of the procedure	58-64	24
2. Content of the final request for proposals	65-74	26
3. Clarifications and modifications	75-76	29
4. Content of proposals	77-82	29
5. Evaluation criteria	83-86	32
6. Submission, opening, comparison and evaluation of proposals	87-91	34
7. Final negotiations	92-93	35
8. Notice of project award	94	36
D. Direct negotiations	95-107	36
1. Circumstances authorizing the use of direct negotiations	99-100	37
2. Measures to enhance transparency in direct negotiations	101-107	38
E. Unsolicited proposals	108-128	40
1. Policy considerations	110-118	40
2. Procedures for handling unsolicited proposals	119-128	42
F. Review procedures	129-133	45
G. Record of selection proceedings	134-141	47

LEGISLATIVE RECOMMENDATIONS

General considerations (see paras. 1-30)

(1) The host country may wish to require the use of competitive procedures for the selection of the concessionaire, subject to the adjustments necessary to take into account the particular needs of privately financed infrastructure projects.

Preselection of bidders (see paras. 39-56)

(2) The host country may wish to provide:

(a) That the bidders should demonstrate that they possess the professional and technical qualifications, financial and human resources, equipment and other physical facilities, managerial capability, reliability and experience, as necessary to carry out all the phases of the project and that they meet such other qualification criteria as may be required under the general procurement laws of the host country.

(b) That the bidders may form consortia to submit proposals, provided that their members should not participate, directly or through subsidiary companies, in more than one consortium.

(c) That any margin of preference for national bidders or bidders who offer to procure supplies, services and products in the local market should be applied at the evaluation phase and must be announced in the invitation to the preselection proceedings;

(d) That the contracting authority may consider arrangements for compensating preselected bidders if the project cannot proceed for reasons outside their control or for contributing to the costs incurred by them;

(e) That the contracting authority should elaborate a short list of the preselected bidders which will be subsequently invited to submit proposals upon completion of the preselection phase.

Single-stage and two-stage procedure for requesting proposals (see paras. 58-64)

(3) The host country may wish to provide that, upon completion of the preselection proceedings, the contracting authority should invite the preselected bidders to submit final proposals with price with respect to the technical specifications or performance indicators and contractual terms.

(4) Notwithstanding the above, the host country may wish to provide that the contracting authority may use a two-stage procedure to request proposals from preselected bidders when it is not feasible for the contracting authority to formulate technical specifications or performance indicators

and contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated.

(5) Where a two-stage procedure is used, the host country may wish to provide:

(a) That the contracting authority should first call upon the preselected bidders to submit proposals relating to broad output specifications and other characteristics of the project as well as to the envisaged contractual terms;

(b) That the contracting authority may convene a meeting of bidders to clarify questions concerning the initial request for proposals and to engage in discussions with any bidder concerning any aspect of its proposal;

(c) That, following those discussions, the contracting authority may review and, as appropriate, revise the initial specifications prior to issuing a final request for proposals.

Content of the final request for proposals (see paras. 65-74)

(6) The host country may wish to provide that the final request for proposals should include the following information:

(a) General information as may be required by the bidders in order to prepare and submit their proposals;

(b) Technical specifications and performance indicators, as appropriate;

(c) The contractual terms envisaged by the contracting authority;

(d) The criteria for evaluating the proposals, the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of proposals.

Clarifications and modifications (see paras. 75-76)

(7) The host country may wish to provide:

(a) That the contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, modify the request for proposals by issuing an addendum at any time prior to the deadline for submission of proposals;

(b) That the contracting authority should prepare minutes of any meeting of bidders convened by the contracting authority, which should contain the requests submitted at the meeting for clarification of the request for proposals, and its responses to those requests, without identifying the sources of the requests.

Contents of the final proposals (see paras. 77-82)

(8) The host country may wish to require that final proposals provide the information required in the request for proposals, in such a manner as to allow the contracting authority to consider the operational feasibility, technical soundness and environmental impact of the project; the total project cost, including operating and maintenance cost and proposed financing plan; and the proposed tariff or payment schedule, as appropriate.

Evaluation criteria (see paras. 83-86)

(9) The host country may wish to provide that evaluation criteria for the technical proposals should concern the effectiveness of the proposal submitted by the bidder in meeting the needs of the contracting authority, including the following:

(a) Technical soundness;

(b) Operational feasibility;

(c) Soundness of the proposed financial arrangements;

(d) Compliance with environmental standards;

(10) The host country may wish to provide that the criteria for the evaluation and comparison of the financial proposals may include, as appropriate:

(a) The present value of the proposed tolls, fees, and other charges over the concession period according to the prescribed minimum design and performance standards;

(b) The present value of the proposed schedule of amortization payments for the facility to be constructed;

(c) The costs for design and construction activities; annual operation and maintenance costs; present value of capital costs and operating costs;

(d) The amount of subsidy, if any, expected from the Government.

Submission, opening, comparison and evaluation of proposals (see paras. 87-91)

(11) The host country may wish to provide:

(a) That upon receipt of the final proposals, the contracting authority should ascertain whether they are *prima facie* responsive to the request for proposals and should reject proposals found to be incomplete or partial;

(b) That the contracting authority may establish a threshold with respect to quality and technical aspects to be reflected in the technical proposals in accordance with the technical criteria as set out in the proposals;

(c) That proposals which fail to achieve the threshold with respect to quality and technical aspects should be regarded as non-responsive.

Final negotiations (see paras. 92-93)

(12) The host country may wish to provide:

(a) That the contracting authority should rank all responsive proposals on the basis of the evaluation criteria set forth in the request for proposals and invite for final negotiation of the project agreement the bidder that has submitted the most advantageous proposal;

(b) That the most advantageous proposal should be:

(i) The proposal offering the lowest price among those that have passed the threshold with respect to quality and technical aspects, where the proposed unit price for the output is the deciding factor; or

(ii) The proposal that obtains the highest combined rating in respect of both price and non-price evaluation criteria. However, the awarding committee should provide a written justification of the reasons for selecting a proposal other than the one offering the lowest unit price for the output.

(c) That final negotiations may not concern those terms of the contract that were deemed not negotiable in the final request for proposals.

Notice of project award (see para. 94)

(13) The host country may wish to provide:

(a) That the contracting authority should cause a notice of the award of the project to be published;

(b) That the notice should identify the concessionaire and provide a summary of the essential terms of the project agreement.

Direct negotiations (see paras. 95-100)

(14) The host country may wish to provide that direct negotiations may be resorted to only in exceptional circumstances which may include the following:

(a) When there is an urgent need for ensuring continuity in the provision of the service, and engaging in a competitive selection procedure would therefore be impractical, provided

that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part;

(b) In case of projects of short duration and with an anticipated initial investment value not exceeding a specified low amount;

(c) Reasons of national defence;

(d) Cases where there is only one source capable of providing the required service (e.g. because it requires the use of patented technology or unique know-how);

(e) Lack of experienced personnel or of an adequate administrative structure to conduct competitive selection procedures;

(f) Cases where a higher administrative authority of the host country authorizes such an exception for reasons of public interest.

(15) The host country may wish to provide that direct negotiations might be further resorted to when an invitation to the preselection proceedings or a request for proposals has been issued but no applications or proposals were submitted, or all proposals were rejected by the contracting authority, and when, in the judgement of the contracting authority, issuing a new request for proposals would be unlikely to result in a project award.

Measures to enhance transparency in direct negotiations (see paras. 101-107)

(16) The host country may wish to provide:

(a) That the approval of a higher authority should be obtained in order for the contracting authority to engage in selection through negotiation;

(b) That the contracting authority should publish a notice of the negotiation proceedings and engage in negotiations with as many companies judged susceptible of meeting the need as circumstances permit;

(c) That the contracting authority should establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals;

(d) That the contracting authority should treat proposals in such a manner so as to avoid the disclosure of their contents to competing bidders;

(e) That any such negotiations between the contracting and bidders should be confidential and one party to the negotiations should not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;

(f) That, following completion of negotiations, the contracting authority should request all bidders remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals;

(g) That any award by the contracting authority be made to the bidder whose proposal best meets the needs of the contracting authority as determined in accordance with the criteria for evaluating the proposals set forth in the invitation to negotiate, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.

Unsolicited proposals (see paras. 108-118)

(17) The host country may wish to provide that, under exceptional circumstances, the contracting authority may be authorized to receive unsolicited proposals, provided that such proposals should not relate to a project for which selection procedures have been initiated or announced by the contracting authority.

Procedures for determining the admissibility of unsolicited proposals (see paras. 122-124)

(18) The host country may wish to provide:

(a) That the contracting authority should request the authors of an unsolicited proposal to submit an initial proposal containing sufficient information to allow the contracting authority to make a *prima facie* assessment of whether the conditions for handling unsolicited proposals are met, in particular whether the proposed project is in the public interest;

(b) That, following a preliminary examination, the contracting authority should inform the company, within a reasonably short period, whether or not there is a potential public interest in the project;

(c) That for projects found to be in the public interest, the contracting authority should invited the proponent to submit a formal proposal in sufficient detail to allow the contracting authority to properly evaluate the concept or technology and determine whether it meets the required conditions and is likely to be successfully implemented at the scale of the proposed project;

(d) That the proponent should retain title to all documents submitted throughout the procedure, and those documents should be returned to it in the event the proposal is rejected.

Procedures for handling unsolicited proposals which do not involve proprietary concepts or technology (see paras. 125-126)

(19) The host country may wish to provide:

(a) That the contracting authority should initiate competitive selection procedures under recommendations 3 to 22 above if it is found that the implementation of the project is possible without the use of a process, design, methodology or engineering concept for which the

proponent or its partners possess exclusive rights or proposed concept or technology is not truly unique or new;

(b) That the company that submitted the original proposal should be invited to participate in such proceedings and might be given a premium for submitting the proposal.

Procedures for handling unsolicited proposals involving proprietary concepts or technology (see paras. 127-128)

(20) The host country may wish to provide:

(a) That the contracting authority should use a procedure for obtaining elements of comparison for the unsolicited proposal if it appears that the innovative aspects of the proposal are such that it would not be possible to implement the project without using a process, design, methodology or engineering concept for which the proponent or its partners possess exclusive rights;

(b) That the contracting authority should publish a summary of the essential terms of the proposal with an invitation for other interested parties to submit alternative or comparable proposals within a certain reasonable period;

(c) That the contracting authority may engage in direct negotiations with the original proponent if no alternative proposals are received, subject to approval by the same authority whose approval would normally be required in order for the contracting authority to select a concessionaire through direct negotiation;

(d) That, if alternative proposals are submitted, the contracting authority should invite all the proponents to competitive negotiations with a view to identifying the most advantageous proposal for carrying out the project.

Review procedures (see paras. 129-133)

(21) The host country may wish to establish procedures whereby bidders who claim to have suffered, or who may suffer, loss or injury due to a breach of a duty imposed on the contracting authority by the law may seek review of the contracting authority's acts.

Record of selection proceedings (see paras. 134-141)

(22) The host country may wish to provide that the contracting authority should keep an appropriate record of key information pertaining to the selection proceedings.

NOTES ON LEGISLATIVE RECOMMENDATIONS

A. General considerations

1. This chapter deals with methods and procedures recommended to be used for the award of privately financed infrastructure projects. In line with the advice of international organizations, such as the World Bank 1/ and UNIDO 2/, the *Guide* expresses a preference for the use of competitive selection procedures, rather than negotiations with bidders, while recognizing that direct negotiations might also be used, according to the legal tradition of the country concerned (see further, paras. 95-98).

2. The selection procedures recommended in this chapter present some of the features of the principal method for the procurement of services under the UNCITRAL Model Law on Procurement of Goods, Construction and Services 3/ with a number of adaptations so as to take into account the particular needs of privately financed infrastructure projects. The method herein consists of a two stage procedure with a preselection phase. It allows some scope for negotiations between the contracting authority and the bidders within clearly defined conditions. The description of the procedures recommended for the selection of the concessionaire is primarily concerned with those elements that are special to, or particularly relevant for, privately financed infrastructure projects. Where appropriate, this chapter refers the reader to provisions of the UNCITRAL Model Law, which may *mutatis mutandis* supplement the selection procedure described herein.

1. Selection procedures covered by the *Guide*

3. Private investment in infrastructure may take various forms, each requiring special methods for selecting the concessionaire. For the purpose of discussing possible selection methods for the infrastructure projects dealt with in the *Guide*, a distinction may be made between three main forms of private investment in infrastructure:

(a) *Purchase of public utilities enterprises*. Private capital may be invested in public infrastructure through the purchase of physical assets or the shares of public utility enterprises. Those transactions are often carried out in accordance with rules governing the award of contracts

---

1/ International Bank for Reconstruction and Development, *Procurement under IBRD and IDA Loans*, 1996, para. 3.13(a).

2/ *UNIDO BOT Guidelines*, p. 96.

3/ The UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereafter referred to as "the UNCITRAL Model Law") and its accompanying Guide to Enactment were adopted by the Commission at its twenty-seventh session (New York, 31 May-17 June 1994).

for the disposition of State property. In many countries, the sale of shares of public utility enterprises requires prior legislative authorization. Disposition methods often include offering of shares on stock markets or competitive proceedings such as auctions or invitations to bid whereby the property is awarded to the qualified party offering the highest price;

(b) *Provision of public services without development of infrastructure*. In other types of projects, the service providers own and operate all the equipment necessary and sometimes compete with other suppliers for the provision of the relevant service. Some national laws establish special procedures whereby the State may authorize a private entity to supply public services by means of exclusive or non-exclusive "licences". Licences may be publicly offered to interested parties who satisfy the qualification requirements set forth by the law or established by the licensing authority. Sometimes licensing procedures involve public auctions to interested qualified parties;

(c) *Construction and operation of public infrastructure*. In projects for the construction and operation of public infrastructure, a private entity is engaged to provide both works and services to the public. The procedures governing the award of those contracts are in some aspects similar to those that govern public procurement of construction and services. National laws provide a variety of methods for public procurement, ranging from structured competitive methods, such as tendering proceedings, to less structured negotiations with prospective suppliers.

4. This chapter deals primarily with selection procedures suitable to be used for infrastructure projects which involve an obligation, on the part of the selected private entity, to undertake physical construction, repair, or expansion works in the infrastructure concerned with a view to subsequent private operation (i.e. those referred to in paragraph 3(c)). It does not deal specifically with methods for disposal of State property for privatization purposes or procedures for licensing public service providers.

5. It should be noted, however, that some infrastructure projects may involve elements of more than one of the categories mentioned above. For instance, the acquisition of a privatized public utility (e.g. a water distribution company) may be coupled with an obligation to effect substantial investment in new infrastructure (e.g. expansion of pipe network). In those situations, it is important to ascertain what is the predominant element of the project (e.g. privatization or construction of new infrastructure) in order to choose the appropriate selection procedure which may then be adjusted so as to take into account the main ancillary obligations expected to be assumed by the concessionaire. To that end, some of the considerations set forth in this chapter may also be relevant, *mutatis mutandis*, for the disposal of State property or licensing procedures which involve an obligation on the part of the new concessionaire or licensee to undertake infrastructure works.

2. General objectives of selection procedures

6. For the award of contracts for infrastructure projects, the contracting authority may either apply methods and procedures already provided in the laws of the host country or establish procedures specifically designed for that purpose. In either situation, it is important to ensure that

such procedures are generally conducive to attaining the fundamental objectives of rules governing the award of public contracts. Those objectives are briefly discussed below.

(a) Economy and efficiency

7. In connection with infrastructure projects, economy refers to the selection of a concessionaire that is capable of performing works and delivering services of the desired quality at the most advantageous price and upon the most advantageous contractual terms. It is promoted by procedures that provide a favourable climate for participation in the selection process by competent companies and that provide incentives to them to offer their most advantageous terms.

8. In most cases, economy is best achieved by means of procedures that promote competition among bidders. Competition provides them with incentives to offer their most advantageous terms, and it can encourage them to adopt efficient or innovative technologies or production methods in order to do so. It should be noted, however, that competition does not necessarily require the participation of a large number of bidders in a given selection process. Particularly for large projects, there may be reasons for the contracting authority to wish to limit the number of bidders to a manageable number (see paras. 23-24). Provided that appropriate procedures are in place, the contracting authority can take advantage of effective competition even where the competitive base is limited.

9. Furthermore, economy can often be promoted through participation by foreign companies in selection proceedings. Not only can foreign participation expand the competitive base, it can also lead to the acquisition by the contracting authority and its country of technologies that are not available locally. Foreign participation in selection proceedings may be necessary where there exists no domestic expertise of the type required by the contracting authority. A country desiring to achieve the benefits of foreign participation should ensure that the relevant laws and procedures are conducive to such participation.

10. Efficiency refers to selection of a concessionaire within a reasonable amount of time, with minimal administrative burdens and at reasonable cost both to the contracting authority and to participating bidders. In addition to the losses that can accrue directly to the contracting authority from inefficient selection procedures (e.g. due to delayed selection or high administrative costs), excessively costly and burdensome procedures can lead to increases in the overall project costs or even discourage competent companies from participating altogether in the selection proceedings.

(b) Promotion of integrity of, and confidence in, the selection process

11. Another important objective of rules governing the selection of the concessionaire is to promote the integrity of, and confidence in, the process. Thus, an adequate selection system will usually contain provisions designed to ensure fair treatment of bidders, to reduce or discourage unintentional or intentional abuses of the selection process by persons administering it or by companies participating in it, and to ensure that selection decisions are taken on a proper basis.

12. Promoting the integrity of the selection process will help to promote public confidence in the process and in the public sector in general. Bidders will often refrain from spending the time and sometimes substantial sums of money to participate in selection proceedings unless they are confident that they will be treated fairly and that their proposals or offers have a reasonable chance of being accepted. Those that do participate in selection proceedings in which they do not have that confidence have a tendency to increase the project cost to cover the higher risks and costs of participation. Ensuring that selection proceedings are run on a proper basis could reduce or eliminate that tendency and result in more favourable terms to the contracting authority.

13. The host country should have in place generally an effective system of sanctions including of a criminal nature against corruption by Government officials, including employees of the awarding authorities, and by bidders, which would apply also to the selection process. Conflicts of interest should also be avoided, for instance by requiring that officials of the contracting authority, their spouses, relatives and associates abstain from owning a debt or equity interest in a company participating in a selection process or accepting to serve as a director or employee of such a company. Furthermore, the law governing the selection proceedings should obligate the contracting authority to reject offers or proposals submitted by a party who gives or agrees to give, directly or indirectly, to any current or former officer or employee of the contracting authority or other governmental authority a gratuity in any form, an offer of employment or any other thing or service of value, as an inducement with respect to an act or decision of, or procedure followed by, the contracting authority in connection with the selection proceedings. These provisions may be supplemented by other measures, such as the requirement that all companies invited to participate in the selection process undertake neither to seek to influence unduly the decisions of the public officials involved in the selection process nor otherwise to distort the competition by means of collusive or other illicit practices (e.g. the so-called "integrity agreement"). Also, in the procurement practices adopted by some countries, bidders are required to guarantee that no official of the procuring entity has been or shall be admitted by the bidder to any direct or indirect benefit arising from the contract or the award thereof. Breach of such a provision typically constitutes a breach of an essential term of the contract.

14. An important corollary of the objectives of economy, efficiency, integrity and transparency is the availability of administrative and judicial procedures for the review of decisions made by the authorities involved in the selection proceedings (see paras. 129-133).

15. The confidence of investors may be further fostered by adequate provisions to protect the confidentiality of proprietary information submitted by them during the selection proceedings. This should include sufficient assurances that the contracting authority will treat proposals in such a manner as to avoid the disclosure of their contents to competing bidders; that any discussions or negotiations will be confidential; and that trade or other information that bidders might include in their proposals will not be made known to their competitors.

(c) Transparency of laws and procedures

16. Transparency of laws and procedures governing the selection of the concessionaire will help to achieve various of the policy objectives already mentioned. Transparent laws are those in which the rules and procedures to be followed by the contracting authority and by bidders are

fully disclosed, are not unduly complex, and are presented in a systematic and understandable way. Transparent procedures are those which enable the bidders to ascertain what procedures have been followed by the contracting authority and the basis of decisions taken by it.

17. One of the most important ways to promote transparency and accountability is to include provisions requiring that the contracting authority maintain a record of the selection proceedings (see paras. 134-141). A record summarizing key information concerning those proceedings facilitates the exercise of the right of aggrieved bidders to seek review. That in turn will help to ensure that the rules governing the selection proceedings are, to the extent possible, self-policing and self-enforcing. Furthermore, adequate record requirements in the law will facilitate the work of Government bodies exercising an audit or control function and promote the accountability of awarding authorities to the public at large as regards the award of infrastructure projects.

18. Transparent laws and procedures create predictability, enabling bidders to calculate the costs and risks of their participation in selection proceedings and thus to offer their most advantageous terms. They also help to guard against arbitrary or improper actions or decisions by the contracting authority or its officials and thus help to promote confidence in the process. Transparency of laws and procedures is of particular importance where foreign participation is sought, since foreign companies may be unfamiliar with the country's practices for the award of infrastructure projects.

3. Special features of selection procedures for privately financed infrastructure projects

19. Generally, economy in the award of public contracts is best achieved through methods that promote competition among a range of bidders within structured, formal procedures. Competitive selection procedures, such as tendering, are usually prescribed by national laws as the rule for normal circumstances in procurement of goods or construction.

20. In competitive selection procedures, the contracting authority typically invites a range of companies to submit proposals which must be formulated on the basis of technical specifications and contractual terms specified by the contracting authority in the documents made available by it to bidders. Proposals are examined, evaluated and compared and the decision on which proposal to accept is made in accordance with essentially objective criteria and procedures that are set forth in the procurement laws and in the tender documents. Competitive selection procedures are said to be "open" when the contracting authority solicits proposals by means of a widely advertised invitation to tender directed to all companies wishing to participate in the proceedings. The procedures are said to be "restricted" when the contracting authority solicits proposals only from certain companies selected by it.

21. The formal procedures and the objectivity and predictability that characterize the competitive selection procedures generally provide optimal conditions for competition, transparency and efficiency. Thus, the use of competitive selection procedures in privately financed infrastructure projects has been recommended by UNIDO, which has formulated detailed practical guidance on how to structure those procedures. 4/ The rules for procurement under

---

4/ *UNIDO BOT Guidelines*, p. 96.

loans provided by the World Bank also advocate the use of competitive selection procedures and provide that a concessionaire selected pursuant to bidding procedures acceptable to the World Bank is generally free to adopt its own procedures for the award of contracts required to implement the project. However, where the concessionaire was not itself selected pursuant to those competitive procedures, the award of subcontracts has to be done pursuant to competitive procedures acceptable to the World Bank. 5/

22. It should be noted, however, that no international legislative model has thus far been specifically devised for competitive selection procedures in privately financed infrastructure projects. On the other hand, domestic laws on competitive procedures for the procurement of goods, construction or services may not be entirely suitable for privately financed infrastructure projects. International experience in the award of privately financed infrastructure projects has in fact revealed some limitations of traditional forms of competitive selection procedures, such as the tendering method. In the light of the particular issues raised by privately financed infrastructure projects, which are briefly discussed below, it is advisable for the Government to consider adapting such procedures for the selection of the concessionaire.

(a) Range of bidders to be invited

23. In traditional Government procurement, the objective of economy is often maximized by allowing for as wide as possible competition among bidders. Invitations to tender are sometimes issued directly without prior preselection proceedings. Where preselection is required, it is sometimes limited to verifying a number of formal requirements (e.g. the bidders' professional qualification or legal capacity).

24. The award of privately financed infrastructure projects, in turn, typically involves complex, time-consuming and expensive proceedings. Furthermore, the sheer scale of most infrastructure projects reduces the likelihood of obtaining proposals from a large number of suitably qualified bidders. In addition, competent bidders may be reluctant to participate in procurement proceedings for high-value projects if the competitive field is too large and where they run the risk of having to compete with unrealistic proposals or proposals submitted by unqualified bidders. Therefore, open tendering without a preselection phase is usually not advisable for the award of infrastructure projects.

(b) Definition of project requirements

25. In traditional public procurement of construction works the Government usually assumes the position of a *maître d'ouvrage* or employer, while the selected contractor carries out the function of the performer of the works. The procurement procedures emphasize the inputs to be provided by the contractor, i. e. the contracting authority establishes clearly what is to be built, how and by what means. Therefore it is common that invitations to tender for construction works are accompanied by extensive and very detailed technical specifications of the type of works and services being procured. In those cases, the contracting authority will be responsible for ensuring

---

5/ International Bank for Reconstruction and Development, *Procurement under IBRD and IDA Loans*, 1996, para. 3.13(a).

that the specifications are adequate to the type of infrastructure to be built and that such infrastructure will be capable of being operated efficiently. In some privately financed infrastructure projects, the contracting authority may wish to establish precise specifications for the works to be performed or the technical means for the services to be provided (i. e. the "input" expected from the concessionaire). Such a choice is made, in particular, in connection with projects involving the construction of new infrastructure to be permanently owned by the Government and destined to be generally open for public use (e.g. roads, tunnels, bridges). In these cases, the contracting authority may see a need to have a larger degree of control over the engineering design and technical specifications than in the case of privately owned facilities generally closed to the public and accessible only to the concessionaire (e.g. a private power plant).

26. However, for many privately financed infrastructure projects, the contracting authority may envisage a different allocation of responsibilities between the public and the private sector. One of the underlying reasons for promoting private sector participation in infrastructure development may be to release the contracting authority from the immediate responsibility for those functions that are capable of being efficiently carried out by the private sector. In those cases, after having established a particular infrastructure need, the contracting authority may prefer to leave to the private sector the responsibility for proposing the best solution for meeting such a need, subject to certain requirements that may be established by the contracting authority (e.g. regulatory performance or safety requirements, sufficient evidence that the technical solutions proposed had been previously tested and satisfactorily met internationally acceptable safety and other standards). The selection procedure used by the contracting authority may thus give more emphasis to the output expected from the project (i.e. the services or goods to be provided) rather than to technical details of the works to be performed or means to be used to provide those services. While the Government remains ultimately accountable to the public for the quality of the works and services, the private sector will bear the risks that might result, for instance, from the inadequacy of the technical solutions used.

(c) Evaluation criteria

27. Goods, construction works or services are typically purchased by Governments with funds available under approved budgetary allocations. With the funding sources usually secured, the main objective of the procuring entity is to obtain the best value for the funds it spends. Therefore, in those types of procurement the decisive factor in establishing the winner among the responsive and technically acceptable proposals is often the global price offered for the construction works, which is calculated on the basis of the cost of the works and other costs incurred by the contractor plus a certain margin of profit.

28. Privately financed infrastructure projects, in turn, are typically expected to be financially self-sustainable, with the development and operational costs being recovered from the project's own revenue. This and the large scale of most infrastructure projects render the task of evaluating proposals considerably more complex than in more traditional forms of procurement. Therefore, a number of other factors will need to be considered in addition to the construction and operation cost and the price to be paid by the users. For instance, the contracting authority will need to consider carefully the financial and commercial feasibility of the project, the soundness of the

financial arrangements proposed by the bidders and the reliability of the technical solutions used. Such interest exists even where no governmental guarantees or payments are involved, because unfinished projects or projects with large cost overruns or higher than expected maintenance costs often have a negative impact on the overall availability of needed services and on the public opinion in the host country. Also, the contracting authority will aim at formulating qualification and evaluation criteria that give adequate weight to the need to ensure the continuous provision of, and, as appropriate, universal access to, the public service concerned. Furthermore, given the usually long duration of infrastructure concessions, the contracting authority will need to satisfy itself of the soundness and acceptability of the arrangements proposed for the operational phase and will weigh carefully the service elements of the proposals (see paras. 83-86).

(d) Negotiations with bidders

29. Laws and regulations governing tendering proceedings often prohibit negotiations between the contracting authority and the contractors concerning a proposal submitted by them. The rationale for such a strict prohibition, which is also contained in article 35 of the UNCITRAL Model Law, is that negotiations might result in an "auction", in which a proposal offered by one contractor is used to apply pressure on another contractor to offer a lower price or an otherwise more favourable proposal. As a result of that strict prohibition, contractors selected to provide goods or services pursuant to traditional procurement procedures are typically required to sign standard contract documents provided to them during the procurement proceedings.

30. The situation is different in the award of privately financed infrastructure projects. The complexity and long duration of those projects makes it unlikely that the contracting authority and the selected bidder could agree on the terms of a draft project agreement without negotiation and adjustments to adapt those terms to the particular needs of the project. This is particularly true for projects involving the development of new infrastructure where the final negotiation of the financial and security arrangements takes place only after the selection of the concessionaire. It is important, however, to ensure that these negotiations are carried out in a transparent manner and do not lead to changes to the basis on which the competition was carried out (see paras. 92-93).

4. Preparations for selection proceedings

31. The award of privately financed infrastructure projects is in most cases a complex exercise requiring careful planning and coordination among the offices involved. By ensuring that adequate administrative and personnel support is available to conduct the type of selection proceeding that it has chosen, the Government plays an essential role in promoting confidence in the selection process.

(a) Appointment of the award committee

32. One important preparatory measure is the appointment of the committee that will be responsible for evaluating the proposals and making an award recommendation to the contracting authority. The appointment of qualified and impartial members to the selection committee is not

only a requirement for an efficient evaluation of the proposals, but may further foster the confidence of bidders in the selection process.

33. Another important preparatory measure is the appointment of the independent advisers who will assist the contracting authority in the selection procedures. The contracting authority may need, at this early stage, to retain the services of independent experts or advisers to assist in establishing appropriate qualification and evaluation criteria, defining performance indicators (and, if necessary, technical specifications) and preparing the documentation to be issued to bidders. Consultant services and advisers may also be retained to assist the contracting authority in the evaluation of proposals, drafting and negotiation of the project agreement in closing the final deal. Consultants and advisers can be particularly helpful by bringing a range of technical expertise which may not always be available in the host country's civil service, such as technical or engineering advice (e.g. on technical assessment of the project or installations, technical requirements of contract); environmental advice (e.g. on environmental assessment, operation requirements); or financial advice (e.g. on financial projections, review of financing sources, assessing the adequate ratio between debt and equity, drafting of financial information documents).

(b) Feasibility and other studies

34. As already indicated (see "Introduction and background information on privately financed infrastructure projects", para. ___), one of the initial steps taken by the Government in respect of a proposed infrastructure project is to conduct a preliminary assessment of its feasibility, including economic and financial aspects such as expected economic advantages of the project, estimated cost and potential revenue anticipated from the operation of the infrastructure facility. The option to develop infrastructure as a privately financed project requires a positive conclusion on the feasibility and financial viability of the project. An assessment of the project's environmental impact should also be ordinarily carried out by the contracting authority as part of its feasibility studies. In some countries, it was found useful to provide for some public participation in the preliminary assessment of the project's environmental impact and the various options available to minimize it.

35. Prior to starting the proceedings leading to the selection of a prospective concessionaire, it is advisable for the contracting authority to review and, as required, expand those initial studies. In some countries awarding authorities are advised to formulate model projects for reference purposes (typically including a combination of estimated capital investment, operation and maintenance costs) prior to inviting proposals from the private sector. The purpose of such model projects is to demonstrate the viability of the commercial operation of the infrastructure and the affordability of the project in terms of total investment cost and cost to the public. They will also provide the contracting authority with a useful tool for comparison and evaluation of proposals. Confidence of bidders will be promoted by evidence that the technical, economical and financial assumptions of the project, as well as the proposed role of the private sector, have been carefully considered by the contracting authority.

(c) Preparation of documentation

36. Selection proceedings for the award of privately financed infrastructure projects typically require the preparation of extensive documentation including a project outline, preselection documents, the request for proposals, instructions for preparing proposals and a draft of the project agreement. The quality and clarity of the documents issued by the contracting authority plays a significant role in ensuring an efficient and transparent selection procedure.

37. In many countries it is customary for the Government to devise standard contract forms and general conditions of contract that are used in public contracting. In some countries there may be fairly detailed standard contracts for different infrastructure sectors. Standard documentation prepared in sufficiently precise terms may be an important element to facilitate the negotiations between bidders and prospective lenders and investors. It may also be useful for ensuring consistency in the treatment of issues common to most projects in a given sector.

38. However, in using standard contract terms it is advisable to bear in mind the possibility that a specific project may raise issues that had not been anticipated when the standard document was prepared or that the project may necessitate particular solutions that might be at variance with the standard terms. Where standard contract documents are provided to bidders during the selection proceedings, the contracting authority may have limited discretion to negotiate the terms of the project agreement with the selected bidders. Careful consideration should be given to the need for achieving the appropriate balance between the level of uniformity desired for project agreements of a particular type and the flexibility that might be needed for finding project-specific solutions.

B. Preselection of bidders

39. Given the complexity of privately financed infrastructure projects the contracting authority may wish to limit the number of bidders from whom proposals will be subsequently requested only to those who satisfy certain qualification criteria. In traditional Government procurement, preselection proceedings may consist of the verification of certain formal requirements, such as adequate proof of technical capability or prior experience in the type of procurement, so that all bidders who meet the preselection criteria are automatically admitted to the tendering phase. Preselection proceedings for privately financed infrastructure projects, in turn, may involve elements of evaluation and selection. Thus, they do not show the same level of automaticity that characterizes the preselection proceedings usually applied for the procurement of goods or services. This may be the case, for example, where the contracting authority establishes a ranking of preselected bidders (see para. 55).

1. Invitation to the preselection proceedings

40. In order to promote transparency and competition, it is advisable that the invitation to the preselection proceedings be published in a manner that reaches an audience wide enough to provide an effective level of competition. The laws of many countries identify publications, usually the official gazette or other official publication, in which the invitation to the preselection proceedings is to be published. With a view to fostering participation of foreign companies and

maximizing competition, the contracting authority may wish to cause the invitations to the preselection proceedings to be published also in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.

41. Preselection documents should contain sufficient information for bidders to be able to ascertain whether the works and services entailed by the project are of a type that they can provide and, if so, how they can participate in the selection proceedings. The invitation to the preselection proceedings should, in addition to identifying the infrastructure to be built or renovated, contain information on other essential elements of the project, such as the services to be delivered by the concessionaire, the financial arrangements envisaged by the contracting authority (e.g. whether the project will be entirely financed by user fees or tolls or whether public funds may be provided as direct payments, loans or guarantees) and, where already known, a summary of the main required terms of the project agreement to be entered into as a result of the selection proceedings.

42. In addition to that, the invitation to the preselection proceedings should include general information similar to the information typically provided in preselection documents under general rules on public procurement (such as, for example, instructions for preparing and submitting preselection applications; any documentary evidence or other information that must be submitted by bidders to demonstrate their qualifications; the manner, place and deadline for the submission of applications).

2. Preselection criteria

43. Generally, bidders should be required to demonstrate that they possess the professional and technical qualifications, financial and human resources, equipment and other physical facilities, managerial capability, reliability and experience, as necessary to carry out the project. Additional criteria that might be particularly relevant for privately financed infrastructure projects may include the ability to manage the financial aspects of the project and previous experience in operating public infrastructure or in providing services under regulatory oversight. Qualification requirements should cover all phases of an infrastructure project, including financing management, engineering, construction, operation and maintenance, where appropriate. In addition to that, the bidders should be required to demonstrate that they meet such other qualification criteria as would typically apply under the general procurement laws of the host country (e.g. that they have legal capacity to enter into the project agreement; that they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing; that they have fulfilled their obligations to pay taxes and social security contributions in the State; that they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a certain period of years preceding the commencement of the selection proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings).

44. The contracting authority should determine the type of information to be provided by the bidders to substantiate their qualification, including, for instance, quality indicators of their past performance as public service providers or infrastructure operators. Such information may relate to the size and type of previous projects carried out by the bidders; the level of experience of the key personnel to be engaged in the project; sufficient organizational capability, including minimum levels of construction, operation and maintenance equipment. The contracting authority should set forth in some detail the manner in which the bidders have to demonstrate their capability to sustain the financing requirements for the engineering, construction and operational phases of the project. The contracting authority may request sufficient information showing the bidders' ability to provide an adequate amount of equity to the project, and sufficient evidence from reputable banks attesting the bidder's good financial standing, and that they have adequate resources.

45. One important aspect to be considered by the contracting authority relates to the relationship between the award of one particular project and the governmental policy pursued for the sector concerned (see "Introduction and background information on privately financed infrastructure projects", paras.___). Where competition is sought, the Government may be interested in ensuring that the relevant market or sector is not dominated by one enterprise (e.g. that the same company does not operate more than a certain limited number of local telephone companies within a given territory). The contracting authority may thus wish to retain the possibility of rejecting a particular proposal if it determines that the award of the project to that particular bidder might give rise to undesirable market domination by a particular company or would otherwise distort competition in the sector concerned. For purposes of transparency, it is desirable for the law to provide that, where the contracting authority reserves the right to reject a proposal on those or similar grounds, adequate notice of that circumstance must be included in the invitation to the preselection proceedings.

46. Qualification requirements should apply equally to all bidders. A contracting authority should not impose any criterion, requirement or procedure with respect to the qualifications of bidders which has not been set forth in the preselection documents. When considering the professional and technical qualifications of bidding consortia, the contracting authority should consider the individual specialization of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

3. Issues relating to the participation of bidding consortia

47. Given the large scale of most infrastructure projects, the interested companies typically participate in the selection proceedings through consortia especially formed for that purpose. Therefore, information required from members of bidding consortia should relate to the consortium as a whole as well as to its individual participants. For the purpose of facilitating the liaison with the contracting authority, it may be useful to require in the preselection documents that each consortium should designate one of its members as a focal point for all communications with the contracting authority. It is generally advisable for the contracting authority to require that the members of bidding consortia submit a sworn statement undertaking that, if awarded the contract, they shall bind themselves jointly and severally for the obligations assumed in the name

of the consortium under the project agreement. Alternatively, the contracting authority may reserve itself the right to require at a later stage that the members of the selected consortium should establish an independent legal entity to carry out the project (see further chapter IV, "The project agreement", paras. ___).

48. It is further advisable for the contracting authority to review carefully the composition of consortia and their parent companies. It may happen that one company, directly or through subsidiary companies, joins more than one consortium to submit proposals for the same project. Such a situation should not be allowed, since it raises the risk of leakage of information or collusion between competing consortia, thus undermining the credibility of the selection proceedings. It is therefore advisable to provide in the invitation to the preselection proceedings that no company may participate, either directly or through subsidiary companies, in more than one consortium in the same selection proceedings. A violation of this rule should cause the disqualification of the consortia concerned.

4. Preselection and domestic preferences

49. The laws of some countries provide for some sort of preferential treatment for domestic entities or afford special treatment to bidders that undertake to use national goods or employ local labour. Such preferential or special treatment is sometimes provided as a material qualification requirement (e.g. a minimum percentage of national participation in the consortium) or as a condition for participating in the selection procedure (e.g. to appoint a local partner as a leader of the bidding consortium).

50. Domestic preferences may give rise to a variety of issues. Firstly, their use is not permitted under the guidelines of some international financial institutions and might be inconsistent with international obligations entered into by many States pursuant to agreements on regional economic integration or trade facilitation. Furthermore, from the perspective of the host country it is further important to weigh the expected advantages against the disadvantage of depriving the contracting authority of the possibility of obtaining better options to meet the national infrastructure needs. It is also important not to allow total insulation from foreign competition so as not to perpetuate lower levels of economy, efficiency and competitiveness of the concerned sectors of national industry. This is the reason why many countries that wish to provide some incentive to national suppliers, while at the same time taking advantage of international competition, do not contemplate a blanket exclusion of foreign participation or restrictive qualification requirements. Domestic preferences may take the form of special evaluation criteria establishing margins of preference for national bidders or bidders who offer to procure supplies, services and products in the local market. The margin of preference technique, which is provided in article 34(4)(d) of the UNCITRAL Model Law, is more transparent than subjective qualification or evaluation criteria. Furthermore, it allows the contracting authority to favour local bidders that are capable of approaching internationally competitive standards, and it does so without simply excluding foreign competition. Where domestic preferences are envisaged, it is advisable that they be announced in advance, preferably in the invitation to the preselection proceedings.

5. Contribution towards costs of participation in selection proceedings

51. In some countries, a high price may be charged for the preselection documents, while in other countries that price might reflect only the cost of printing the preselection documents and providing them to the bidders. Expensive preselection documents may be used as an additional tool to limit the number of bidders. At the same time, however, they add to the already considerable cost of participation in the selection proceedings. The high costs of preparing proposals for infrastructure projects and the relatively high risks that a selection procedure may not lead to a contract award may function as a deterrent for some companies to join in a consortium to submit a proposal, particularly when they are not familiar with the selection procedures applied in the host country.

52. Therefore, some countries authorize the contracting authority to consider arrangements for compensating preselected bidders if the project cannot proceed for reasons outside their control or for contributing to the costs incurred by them after the preselection phase, when justified in a particular case by the complexity involved and the prospect of significantly improving the quality of the competition. It is advisable that such contribution or compensation, when authorized, be announced at an early stage, preferably in the invitation to the preselection proceedings.

6. Preselection proceedings

53. The contracting authority should respond to any request by a bidding consortium for clarification of the preselection documents that is received by the contracting authority within a reasonable time prior to the deadline for the submission of applications. The response by the contracting authority should be given within a reasonable time so as to enable the bidders to make a timely submission of their application. The response to any request that might reasonably be expected to be of interest to other bidders should, without identifying the source of the request, be communicated to all bidders to which the contracting authority provided the preselection documents.

54. In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (e.g. three or four). For that purpose, those countries apply a quantitative rating system for technical, managerial and financial criteria, taking into account the nature the project. Quantitative preselection criteria are found to be more easily applicable and transparent than qualitative criteria involving the use of merit points. However, in devising a quantitative rating system, it is important to avoid unnecessary limitation of the contracting authority's discretion in assessing the qualifications of bidders. The contracting authority may also need to take into account the fact that the procurement guidelines of some multilateral financial institutions prohibit the use of preselection proceedings for the purpose of limiting the number of bidders to a predetermined number. In any event, where such a rating system is to be used, that circumstance should be clearly stated in the preselection documents.

55. Upon completion of the preselection phase, the contracting authority usually elaborates a short list of the preselected bidders which will be subsequently invited to submit proposals. One practical problem sometimes faced by awarding authorities concerns proposals for changes in the

composition of bidding consortia during the selection proceedings. From the perspective of the contracting authority, it is generally advisable to exercise caution in respect of proposed substitutions of individual members of bidding consortia after the closing of the preselection phase. Changes in the composition of consortia may substantially alter the basis on which the preselected bidding consortia were short-listed by the contracting authority and may give rise to questions about the integrity of the selection proceedings. As a general rule, only preselected bidders should be allowed to participate in the selection phase, unless the contracting authority can satisfy itself that a new consortium member meets the preselection criteria to substantially the same extent as the retiring member of the consortium.

56. While the criteria used for preselecting bidders should not be weighted again at the evaluation phase, the contracting authority may wish to reserve itself the right to require, at any stage of the selection process, that the bidders again demonstrate their qualifications in accordance with the same criteria used to preselect them.

C. Procedures for requesting proposals

57. This section discusses the procedures for requesting proposals from the preselected bidders. The procedures described herein are in a number of respects similar to the procedures for the solicitation of proposals under the preferred method for the procurement of services provided in the UNCITRAL Model Law, with some adaptations needed to fit the needs of contracting authorities awarding infrastructure projects.

1. Phases of the procedure

58. Following the preselection of bidders, it is advisable for the contracting authority to review its original feasibility study and the definition of the output and performance requirements and consider whether a revision of those requirements is needed in the light of the information obtained during the preselection proceedings. At this stage, the contracting authority should have already determined whether a single or a two-stage procedure will be used to request proposals; whether bidders will be asked to formulate proposals on the basis of performance indicators or technical specifications; and, in the latter case, whether alternatives to those specifications will be considered.

(a) Single-stage procedure

59. The decision between having a single or a two-stage procedure for requesting proposals will depend on the nature of the contract, on how precisely the technical requirements can be defined, and whether output results (or performance indicators) are used for selection of the concessionaire. If it is deemed both feasible and desirable for the contracting authority to formulate performance indicators or technical specifications to the necessary degree of precision or finality, the selection process may be structured as a single-stage procedure, in which case, after having concluded the preselection of bidders, the contracting authority would proceed directly to issue a final request for proposals (see paras. 65-74)

(b) Two-stage procedure

60. There are cases, however, in which it may not be feasible for the contracting authority to formulate its requirement in sufficiently detailed and precise technical specifications or performance indicators to permit proposals to be formulated, evaluated and compared uniformly on the basis of those specifications and indicators. This may be the case, for instance, when the contracting authority has not determined the type of technical and material input that would be suitable for the project in question (e.g. the type of construction material to be used in a bridge). In such cases, it might be considered undesirable, from the standpoint of obtaining the best value, for the contracting authority to proceed on the basis of specifications or indicators it has drawn up in the absence of discussions with bidders as to the exact capabilities and possible variations of what is being offered. For that purpose, the contracting authority may wish to divide the selection proceedings into two stages and allow a certain degree of flexibility for discussions with bidders.

61. Where the selection procedure is divided in two stages, the initial request for proposals typically calls upon the bidders to submit proposals relating to broad output specifications and other characteristics of the project as well as to the envisaged contractual terms. The invitation for bids would allow bidders to offer their own solutions for meeting the particular infrastructure need in accordance with defined standards of service. The proposals submitted at this stage would typically consist of solutions on the basis of a conceptual design or performance indicators without indication of financial elements, such as the expected tariff or level of remuneration.

62. To the extent the terms of the contractual arrangements are already known by the contracting authority, they should be included in the request for proposals, possibly in the form of a draft of the project agreement. Knowledge of certain contractual terms, such as the risk allocation envisaged by the contracting authority, is important in order for the bidders to formulate their proposals and discuss the "bankability" of the project with potential lenders. The initial response to those contractual terms, in particular the risk allocation envisaged by the contracting authority, may help the contracting authority assess the feasibility of the project as originally conceived. However, it is important to distinguish between the procedure to request proposals and the negotiation of the final contract, after the project has been awarded. The purpose of this initial stage is to enable the contracting authority to formulate its requirement subsequently in a manner that enables a final competition to be carried out on the basis of a single set of parameters. The invitation of initial proposals at this stage should not lead to a negotiation of the terms of the contract prior to its final award.

63. The contracting authority may then convene a meeting of bidders to clarify questions concerning the request for proposals and accompanying documentation. The contracting authority may, in the first stage, engage in discussions with any bidder concerning any aspect of its proposal. The contracting authority should treat proposals in such a manner as to avoid the disclosure of their contents to competing bidders. Any discussions need to be confidential, and one party to the discussions should not reveal to any other person any technical, financial or other information relating to the discussions without the consent of the other party.

64. Following those discussions, the contracting authority should review and, as appropriate, revise the initial output specifications. In formulating those revised specifications, the contracting authority should be allowed to delete or modify any aspect of the technical or quality characteristics of the project originally set forth in the request for proposals, and any criterion originally set forth in those documents for evaluating and comparing proposals. Any such deletion, modification or addition should be communicated to bidders in the invitation to submit final proposals. Bidders not wishing to submit a final proposal should be allowed to withdraw from the selection proceedings without forfeiting any security that they may have been required to provide.

2. Content of the final request for proposals

65. At the final stage, the contracting authority should invite the bidders to submit final proposals with respect to the revised performance indicators (or technical specifications, as appropriate) and contractual terms.

66. The request for proposals should generally include all information necessary to provide a basis for enabling the bidders to submit proposals that meet the needs of the contracting authority and that the contracting authority can compare in an objective and fair manner.

(a) General information to bidders

67. General information to bidders should cover, as appropriate, those items which are ordinarily included in solicitation documents or requests for proposals for the procurement of goods, construction and services (cf., for example, articles 27 and 38 of the UNCITRAL Model Law). It includes, for example:

(a) Instructions for preparing and submitting proposals, including the manner, place and deadline for the submission of proposals and the period of time during which proposals shall be in effect and any requirements concerning tender securities;

(b) The means by which bidders may seek clarifications of the request for proposals, and a statement as to whether the contracting authority intends, at this stage, to convene a meeting of bidders;

(c) The place, date and time for the opening of proposals and the procedures to be followed for opening and examining proposals;

(d) The manner in which the proposals will be evaluated. Particularly important is the disclosure of the criteria to be used by the contracting authority in determining the successful proposal, including any margin of preference and any criteria other than price to be used, and the relative weight of such criteria (see paras. 83-86).

68. If alternative proposals, including variations to non-mandatory elements of the request for proposals, are admitted, the contracting authority should indicate the manner in which they would be compared and evaluated. Alternative proposals should be rejected if they are not accompanied

by a fully responsive proposal. Where the contracting authority further reserves the right to reject all proposals, without incurring liability towards bidders, such as compensation for their costs of preparing and submitting proposals, a statement to that effect should be included in the request for proposals.

(b) Technical specifications and performance indicators

69. The level of detail provided in the specifications, as well as the appropriate balance between the input and output elements, will be influenced by considerations of issues such as the type and ownership of the infrastructure and the allocation of responsibilities between the public and the private sectors (see paras. 25-26). It is generally advisable for the contracting authority to bear in mind the long-term needs of the project and to formulate its specifications in a manner that allows it to obtain sufficient information to select the bidder that offers the highest quality of services at the best economic terms.

70. Generally, when the contracting authority invites proposals on the basis of a single set of technical specifications the request for proposals typically includes the following information:

(a) Description of the works and services to be performed, including technical specifications, plans, drawings and designs;

(b) The location where the construction is to be effected and the services to be provided;

(c) Time schedule for the execution of works and provision of services;

(d) The technical requirements for the operation and maintenance of the facility.

71. Where the contracting authority requests proposals on the basis of performance indicators, it is important to formulate them in a way that defines adequately the output and performance required without being overly prescriptive in how that is to be achieved. Performance indicators typically cover items such as the following:

(a) Description of project and expected output. If the services require specific buildings, such as a transport terminal or an airport, the contracting authority may wish to provide no more than outline planning concepts for the division of the site as usage zones on an illustrative basis, instead of plans indicating the footprint of individual buildings, as would normally be the case in traditional procurement of construction services;

(b) Minimum applicable design and performance standards, including appropriate environmental standards. Performance standards are typically formulated in terms of the desired quantity and quality of the outputs of the facility. Proposals which deviate from the relevant performance standards should be regarded as non-responsive;

(c) Requirements for the expansion of service;

(d) Quality of maintenance of facilities;

(e) Attention to customers;

(f) Economic and financial soundness of the concessionaire.

72. Each of the above-mentioned performance indicators may require the submission of additional information by the bidders, according to the project being awarded. For the award of a concession for distribution of electricity in a specific region, for example, they may include minimum technical standards such as: (a) specified voltage (and frequency) fluctuation at consumer level; (b) outage duration (expressed in hours per year); (c) outage frequency (expressed in a number per year); (d) losses; (e) number of days to connect a new customer; (f) commercial standards for customer relationship (e.g. number of days to pay bills; to reconnect installations; to respond to customers' complaints).

(c) Contractual terms

73. It is advisable that the bidding documents provide some indication of how the contracting authority expects to allocate the project's risks. This is important in order to set the terms of debate for the detailed negotiations on the project agreement. If risk allocation is left entirely open, the bidders may likely respond by seeking to minimize the risks they accept, which may frustrate the purpose of seeking private investment for developing the project. Furthermore, the request of proposals should contain information on essential elements of the contractual arrangements envisaged by the contracting authority, such as:

(a) The duration of the concession or invitations to bidders to submit proposals for the duration of the concession;

(b) Formula and price indices to be used in adjustments to tariffs;

(c) Government support and investment incentives, if any;

(d) Bonding requirements;

(e) Requirements of regulatory bodies, if any;

(f) Monetary rules and regulations governing foreign exchange remittances;

(g) Revenue sharing arrangements, if any;

(h) Indication of the categories of assets which the concessionaire would be required to transfer to the contracting authority or make available to a successor concessionaire at the end of the project period;

(i) Where a new concessionaire is being selected to operate an existing infrastructure, a description of the assets and property that will be made available to the concessionaire;

(j) The possible alternative, supplementary or ancillary revenue sources (e.g. concessions for exploitation of existing infrastructure), if any, that may be offered to the successful bidder.

74. In order to establish clearly the scope of the negotiations that will take place following the evaluation of proposals (see paras. 92-93), the final request for proposals should indicate which are the terms of the project agreement that are deemed not negotiable.

3. Clarifications and modifications

75. It is desirable to establish procedures for clarification and modification of the request for proposals in a manner that will foster efficient, fair and successful conduct of selection proceedings. The right of the contracting authority to modify the request for proposals is important in order to enable it to obtain what is required to meet its needs. It is also desirable to authorize the contracting authority, whether on its own initiative or as a result of a request for clarification by a bidder, to modify the request for proposals by issuing an addendum at any time prior to the deadline for submission of proposals. However, in case of extensive amendments of the request for proposals, the deadline for submission of proposals may need to be extended.

76. Generally, clarifications, together with the questions that gave rise to the clarifications, and modifications must be communicated promptly by the contracting authority to all bidders to whom the contracting authority provided the request for proposals. If the contracting authority convenes a meeting of bidders, it should prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the request for proposals, and its responses to those requests, without identifying the sources of the requests, and send copies to the bidders.

4. Content of the final proposals

(a) Technical proposals

77. The technical proposals to be submitted by the bidders should include the following information:

(a) Operational feasibility of the project, which shall indicate the proposed organization, methods and procedures for the operation and maintenance of the project under bidding;

(b) Technical soundness of the preliminary engineering design, including proposed schedule of works;

(c) Preliminary environmental assessment, indicating the possible adverse effects of the project on the environment and the corresponding mitigating measures;

(d) Project cost including operating and maintenance cost requirements and proposed financing plan (e.g. proposed equity contribution, debt);

(e) Bid security (see paras. 81-82).

78. It is useful for the contracting authority to require that the final proposals submitted by the bidders contain evidence showing the comfort of the bidder's preferred lenders with the proposed commercial terms and allocation of risks, as outlined in the request for proposals. Such a requirement might play a useful role in resisting pressures to reopen commercial terms at the stage of final negotiations. In some countries, bidders are required to initial and return to the contracting authority the draft project agreement together with their final proposals as a confirmation of their acceptance of all terms in respect of which they did not propose specific amendments.

(b) Financial proposals

79. For projects in which the concessionaire's income is expected to consist primarily of tolls, fees or charges paid by the customers or users of the infrastructure facility, the financial proposal should indicate the proposed tariff structure. For projects in which the concessionaire's income is expected to consist primarily of payments made by the contracting authority or another Governmental agency to amortize the concessionaire's investment, the financial proposal should indicate the proposed amortization payments and repayment period. Furthermore, for either case the financial proposals should include:

(a) The present value of the proposed charges or amortization payments based on the discounting rate and foreign exchange rate prescribed in the bidding documents;

(b) The proposed duration of the concession, where it is not specified in the request for proposals;

(c) Level of governmental financial support required for the project, including, as appropriate, any subsidy or guarantee expected from the contracting authority;

(d) The extent of risks assumed by the bidders during construction and operation phase, including unforeseen events, insurance, equity investment and other guarantees against those risks.

(c) Feasibility studies

80. Feasibility studies are particularly important in privately financed infrastructure projects and should cover, for instance, the following aspects:

(a) *Commercial viability*: particularly in projects financed on a non-recourse or limited recourse basis, it is essential to establish the need for the project outputs and to evaluate and project such needs over the proposed operational life of the project, including expected demand (e.g. traffic forecasts for roads) and pricing (e.g. tolls);

(b) *Engineering design and operational feasibility*: bidders should be requested to demonstrate the suitability of the technology they propose, including equipment and processes,

to national, local and environmental conditions, the likelihood of achieving the planned performance level and the adequacy of the construction methods and schedules. This study should also define the proposed organization, methods and procedures for operating and maintaining the completed facility;

(c) *Financial viability*: bidders should be requested to indicate the proposed sources of financing for the construction and operation phases, including debt capital and equity investment. While the loan and other financing agreements in most cases are not executed until after the signing of the project agreement, the bidders should be required to submit sufficient evidence of the lenders' intention to provide the specified financing. In some countries, bidders are also required to indicate the expected financial internal rate of return in relation to the effective cost of capital corresponding to the financing arrangements proposed. Such information is intended to allow the contracting authority to consider the reasonableness and affordability of the proposed tariffs or prices to be charged by the concessionaire and the potential for subsequent increases therein;

(d) *Environmental impact*: this study should identify possible negative or adverse effects on the environment as a consequence of the project and indicate corrective measures that need to be taken.

(d) Bid securities

81. It is advisable for the laws or regulations governing the selection process to authorize the contracting authority to require the bidders to post a bid security so as to cover those losses that may result from withdrawal of proposals or failure by the selected bidder to conclude a project agreement.

82. It is advisable that the request for proposals indicate any requirements of the contracting authority with respect to the issuer and the nature, form, amount and other principal terms of any bid security to be provided by bidders submitting proposals. In order to ensure a fair treatment of all bidders, requirements that refer directly or indirectly to the conduct by the bidder submitting the proposal should not relate to conduct other than: withdrawal or modification of the proposal after the deadline for submission of proposals, or before the deadline if so stipulated in the request for proposals; failure to achieve financial closing; failure to sign the project agreement if required by the contracting authority to do so; and failure to provide a required security for the performance of the project agreement after the proposal has been accepted or to comply with any other condition precedent to signing the project agreement specified in the request for proposals. Safeguards should be included to ensure that a bid-security requirement is only imposed fairly and for the intended purpose.6/

6/ Article 32 of the UNCITRAL Model Law provides certain important safeguards, including, *inter alia*, the requirement that the contracting authority should make no claim to the amount of the tender security, and should promptly return, or procure the return of, the tender security document, after whichever of the following that occurs earliest: (a) the expiry of the tender security; (b) the entry into force of the project agreement and the provision of a security for the performance of the contract, if such a security is required by

5. Evaluation criteria

83. The award committee should rate the technical and financial elements of each proposal in accordance with the predisclosed rating systems for the technical evaluation criteria and specify in writing the reasons for the rating. Generally, it is important for the contracting authority to achieve an appropriate balance between evaluation criteria relating to the physical investment (e.g. the construction works) and evaluation criteria relating to the operation of the infrastructure and the quality of services to be provided by the concessionaire. Adequate emphasis should be given to the long term needs of the contracting authority, in particular the need to ensure the continuous delivery of the service at the required level of quality and safety.

84. Technical evaluation criteria are designed to facilitate the assessment of the technical, operational, environmental, and financing viability of the proposal vis-à-vis the prescribed specifications, indicators and requirements prescribed in the bidding documents. To the extent practicable, the technical criteria applied by the contracting authority should be objective and quantifiable, so as to enable proposals to be evaluated objectively and compared on a common basis. This reduces the scope for discretionary or arbitrary decisions. Regulations governing the selection process might spell out how such factors are to be formulated and applied. Technical proposals for privately financed infrastructure projects are usually evaluated in accordance with the following criteria:

(a) *Technical soundness*. Where the contracting authority has established minimum engineering design and performance specifications or standards, the basic design of the project should conform to those specifications or standards. Bidders should be required to demonstrate the soundness of the proposed construction methods and schedules;

(b) *Operational feasibility*. The proposed organization, methods, and procedures for operating and maintaining the completed facility must be well defined, should conform to the prescribed performance standards, and should be shown to be workable. Where feasible, it should provide for the transfer of technology used in every phase of the project;

(c) *Quality of services*. Evaluation criteria used by the contracting authority may include an analysis of the manner in which the bidders undertake to maintain and expand the service, including the guarantees offered for ensuring its continuity;

(d) *Environmental standards*. The proposed design and the technology of the project to be used should be in accordance with the environmental standards set forth in the request for proposals. Any negative or adverse effects on the environment as a consequence of the project as proposed by the bidders should be properly identified, including the corresponding corrective or mitigating measures;

---

the request for proposals; (c) the termination of the selection process without the entry into force of a project agreement; or (d) the withdrawal of the proposal prior to the deadline for the submission of proposals, unless the request for proposals stipulates that no such withdrawal is permitted.

(e) *Financial viability*. Technical proposals should demonstrate that the proposed financing plan is adequate to meet the construction, operating and maintenance costs of the project. The contracting authority should assess whether the financing proposals of the bidders adequately meet the cost requirements of the project;

(f) *Enhancements*. Other terms which the project proponent may offer to make the proposals more attractive, such as revenue-sharing with the contracting authority, less governmental guarantees or reduction in the level of Government support.

85. In addition to criteria for the technical evaluation of proposals, the contracting authority needs to define criteria for assessing and comparing the financial proposals. For projects in which the concessionaire's income is expected to consist primarily of tolls, fees or charges paid by the customers or users of the infrastructure facility, the assessment and comparison of the financial elements of the final proposals is typically based on the present value of the proposed tolls, fees, rentals and other charges over the concession period according to the prescribed minimum design and performance standards. For projects in which the concessionaire's income is expected to consist primarily of payments made by the contracting authority to amortize the concessionaire's investment, the assessment and comparison of the financial elements of the final proposals is typically based on the present value of the proposed schedule of amortization payments for the facility to be constructed according to the prescribed minimum design and performance standards, plans and specifications. However, the contracting authority's assessment of financial elements of the final proposals should not be limited to a comparison of the unit prices offered for the expected output. In order to consider adequately the financial feasibility of the proposals and the likelihood of subsequent increases in the proposed prices, additional criteria may need to be considered, such as the costs for design and construction activities; annual operation and maintenance costs; present value of capital costs and operating costs; and the amount of subsidy, if any, expected from the Government.

86. Evaluation of financial proposals vary in form and complexity depending on the form of the desired private participation. In some cases the financial proposal may include the cost of financing offered by bidders; in this case the requirement for financing and how it will be considered in the evaluation of proposals should be defined in the request for proposals. In establishing the criteria for the evaluation of financial proposals, it is important for the contracting authority to consider carefully the relative importance of the proposed unit price for the expected output as an evaluation criterion. While the unit price is an important factor for ensuring objectiveness and transparency in the choice between equally responsive proposals, it should be noted that the notion of "price" usually does not have the same value for the award of privately financed infrastructure projects as it has in the procurement of goods and services. Indeed, the remuneration of the concessionaire is often the combined result of charges paid by the users, ancillary revenue sources and direct subsidies or payments made by the public entity awarding the contract. Therefore, while the unit price for the expected output retains its role as an important element of comparison of proposals, it may not always be regarded as the most important factor.

6. Submission, opening, comparison and evaluation of proposals

87. Proposals should be required to be submitted in writing, signed and in sealed envelopes. Proposals received by the contracting authority after the deadline for the submission of proposals should not be opened and should be returned to the bidder that submitted it.

88. For the purpose of ensuring transparency, national laws often prescribe formal procedures for the opening of proposals, usually at a time previously specified in the request for proposals, and require that the bidders that have submitted proposals, or their representatives, be permitted by the contracting authority to be present at the opening of proposals. Such a requirement helps to minimize the risk that the proposals might be altered or otherwise tampered with and represents an important guarantee of the integrity of the proceedings.

89. In view of the complexity of privately financed infrastructure projects and the variety of evaluation criteria usually applied in the award of the project, in some countries bidders are required to formulate and submit their technical and financial proposals in two separate envelopes. The two-envelope system is sometimes used because it permits the contracting authority to evaluate the technical quality of proposals without being influenced by their financial components. However, the method has been criticized as being contrary to the objective of economy in the award of public contracts. In particular, there is said to be a danger that, by selecting proposals initially on the basis of technical merit alone and without reference to price, a contracting authority might be tempted to select, upon the opening of the first envelope, proposals offering technically superior works and to reject proposals offering less sophisticated solutions that nevertheless meet the contracting authrority's needs at an overall lower cost. International financial institutions, such as the World Bank, do not accept the two-envelope system for projects financed by them because of concerns that the system gives margin to a higher degree of discretion in the evaluation of proposals and makes it more difficult to compare them in an objective manner

90. As an alternative to the use of a two-envelope system, the awarding authorities may require both technical and financial proposals to be contained in one single proposal, but structure their evaluation in two stages, as in the evaluation procedure provided in article 42 of the UNCITRAL Model Law. In an initial stage, the contracting authority typically establishes a threshold with respect to quality and technical aspects to be reflected in the technical proposals in accordance with the technical criteria as set out in the proposals, and rates each technical proposal in accordance with such criteria and the relative weight and manner of application of those criteria as set forth in the request for proposals. The contracting authority then compares the financial proposals that have attained a rating at or above the threshold. When the technical and financial proposals are to be evaluated consecutively, the contracting authority should initially ascertain whether the technical proposals are *prima facie* responsive to the request for proposals (e.g. whether they cover all items required to be addressed in the technical proposals). Incomplete or partial proposals, as well as proposals that deviate from the request for proposals, should be rejected at this stage. While the contracting authority may ask bidders for clarifications of their proposals, no change in a matter of substance in the proposal, including changes aimed at making an unresponsive proposal responsive, should be sought, offered or permitted at this stage.

91. In addition to deciding whether to use a two-envelope system or a two-stage evaluation procedure, it is important for the contracting authority to disclose the relative weight to be accorded to each evaluation criterion and the manner in which they are to be applied in the evaluation of proposals. Two possible approaches might be used to reach an appropriate balance between financial and technical aspects of the proposals. One possible approach is to consider as most advantageous the proposal that obtains the highest combined rating in respect of both price and non-price evaluation criteria. Alternatively, the price proposed for the output (e.g. the water or electricity tariff, the level of tolls) might be the deciding factor for establishing the winning proposal among the responsive proposals (i.e. those that have passed the threshold with respect to quality and technical aspects). In any event, in order to promote the transparency of the selection process and to avoid improper use of non-price evaluation criteria, it is advisable to require the awarding committee to provide a written justification of the reasons for selecting a proposal other than the one offering the lowest unit price for the output.

7. Final negotiations

92. The contracting authority should rank all responsive proposals on the basis of the evaluation criteria set forth in the request for proposals and invite for final negotiation of the project agreement the bidder that has attained the best rating or, as appropriate, the one that offered the lowest price for the output among those that attained the minimum threshold in respect of technical aspects. The final negotiations should be limited to fixing the final details of the transaction documentation and satisfying the reasonable requirements of the selected bidder's lenders. One particular problem faced by awarding authorities is the danger that the negotiations with the selected bidder might lead to pressures to amend, to the detriment of the Government or the consumers, the price or risk allocation originally contained in the proposal. Changes in essential elements of the proposal should not be permitted, as they may distort the assumptions on the basis of which the proposals were submitted and rated. Therefore, the negotiations at this stage may not concern those terms of the contract that were deemed not negotiable in the final request for proposals. The risk of re-opening commercial terms at this late stage could be further minimized by insisting that the selected bidder's lenders indicate their comfort with the risk allocation embodied in their bid at a stage where there is competition among bidders (see para. 78). The contracting authority's financial advisers might contribute to this process by advising whether bidders' proposals are realistic, and what levels of financial commitment are appropriate at each stage. The process of reaching financial close can itself be quite lengthy.

93. The contracting authority should inform the remaining responsive bidders that they may be considered for negotiation if the negotiations with the bidder with better ratings do not result in a project agreement. If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a project agreement, the contracting authority should inform that bidder that it is terminating the negotiations and then invite for negotiations the next bidder on the basis of its ranking until it arrives at a project agreement or rejects all remaining proposals. To avoid the possibility of abuse and unnecessary delay, the awarding entity should not reopen negotiations with any bidder with whom they had already been terminated.

8. Notice of project award

94. Project agreements frequently include provisions that are of direct interest for parties other than the contracting authority and the concessionaire, and who might have a legitimate interest in being informed about certain essential elements of the project. This is particularly the case for projects involving the provision of a service directly to the general public. For transparency purposes, it may be advisable to establish procedures for publicizing those terms of the project agreement that may be of public interest. One possible procedure may be to require the contracting authority to publish a notice of the award of the project, indicating, *inter alia*, the following elements: (a) the name of the concessionaire; (b) the annexes and enclosures that form part of the agreement; (c) a description of the works and services to be performed by the concessionaire; (d) the duration of the concession; (e) the tariff structure; (f) the rights and obligations of the concessionaire and the guarantees to be provided by it; (g) the monitoring rights of the contracting authority and remedies for breach of the project agreement; (h) the obligations of the Government, including any payment, subsidy or compensation offered by the Government; and (i) any other essential term of the project agreement, as provided in the request for proposals. Where such a system is used, it is important to ensure consistency between the notice of award and the project agreement.

D. Direct negotiations

95. In the legal tradition of certain countries, privately financed infrastructure projects involve the delegation by the contracting authority of the right and duty to provide a public service. As such, they are subject to a special legal regime that differs in many respects from the regime that applies generally to the award of public contracts for the purchase of goods, construction or services.

96. In those legal systems, the Government generally has the choice of a number of procedures for the award of public contracts for the purchase of goods or services. As a general rule, those procedures involve publicity requirements, competition and the strict application of pre-established award criteria. The most common procedure is the tendering method, in which the contract is awarded to the tenderer offering the lowest price. While there also exist less rigid procedures, such as the request for proposals, which allows for consideration of other elements in addition to price (e.g. operating cost, technical merit and proposed completion time), negotiations are only resorted to under exceptional circumstances. However, those countries apply different procedures for the award of privately financed infrastructure projects. Given the very particular nature of the services required (e.g. complexity, amount of investment and completion time), the procedures used place the accent on the contracting authority's freedom to choose the operator who best suits its need, in terms of professional qualification, financial strength, ability to ensure the continuity of the service, equal treatment of the users and quality of the proposal. In contrast to the competitive selection procedures usually followed for the award of public contracts, which sometimes may appear to be excessively rigid, selection by direct negotiation is characterized by a high degree of flexibility as to the procedures involved and discretion on the part of the contracting authority. However, freedom of negotiation does not mean arbitrary choice and the laws of those countries provide procedures to ensure transparency and fairness in the conduct of the selection process.

97. In other countries, where tendering is under normal circumstances the rule for the award of public contracts, guidelines issued to awarding authorities advise the use of direct negotiations whenever possible for the award of privately financed infrastructure projects. The rationale for encouraging negotiations in those countries is that in negotiating with bidders the Government is not bound by pre-determined requirements or rigid specifications and has more flexibility for taking advantage of innovative or alternative proposals that may be submitted by the bidders in the selection proceedings, as well as for changing and adjusting its own requirements in the event that more attractive options for meeting the infrastructure needs are formulated during the negotiations.

98. Negotiated methods generally afford a high degree of flexibility that some countries may find beneficial to the selection of the concessionaire. However, negotiated methods may have a number of disadvantages that make them less suitable to be used as a principal selection method in a number of countries. Because of the high level of flexibility and discretion afforded to the contracting authority, negotiated methods require highly skilled personnel with sufficient experience in negotiating complex projects. They also require a well structured negotiation team, clear lines of authority and a high level of coordination and cooperation among all the offices involved. Therefore, the use of negotiations for the award of privately financed infrastructure projects may not represent a viable alternative for countries that do not have the tradition of using such methods for the award of large Government contracts. Another disadvantage of negotiated methods is that they may not ensure the level of transparency and objectivity that can be achieved by more structured competitive methods. In some countries there might be concerns that the higher level of discretion in negotiated methods might carry with it a higher risk of abusive or corrupt practices. In the light of the above, the host country may wish to prescribe the use of the competitive selection procedures as a rule for the award of privately financed infrastructure projects and reserve direct negotiations only for exceptional cases.

1. Circumstances authorizing the use of direct negotiations

99. For transparency purposes as well as for ensuring discipline in the award of projects, it might be generally desirable for the law to identify the exceptional circumstances that may authorize the use of direct negotiations. They may include, for example, the following:

(a) When there is an urgent need for ensuring immediate provision of the service, and engaging in a competitive selection procedure would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part. Such an exceptional authorization may be needed, for instance, in cases of interruption in the provision of a given service or where an incumbent concessionaire fails to provide the service at acceptable standards or if the project agreement is rescinded by the contracting authority, when engaging in a competitive selection procedure would be impractical in view of the urgent need to ensure the continuity of the service;

(b) In case of projects of short duration and with an anticipated initial investment value not exceeding a specified low amount;

(c) Reasons of national defence;

(d) Cases where there is only one source capable of providing the required because it can be provided only by the use of patented technology or unique know

(e) Lack of experienced personnel or of an adequate administrative structu competitive selection procedures.

100. In addition to the above, after a competitive selection procedure has be situations might arise under which the contracting authority may prefer to change method in favour of direct negotiations. This may be particularly the case when an the preselection proceedings or a request for proposals has been issued but no ap proposals were submitted, or all proposals were rejected by the contracting authorit in the judgement of the contracting authority, issuing a new request for propos unlikely to result in a project award. In such a case, the contracting authority mi enter into negotiations with responsive bidders, as a an alternative to having to reject and start another procedure with possible uncertain results.

2. Measures to enhance transparency in direct negotiations

101. Procedures to be followed in procurement through negotiation are typically by a higher degree of flexibility than the procedures applied to other methods of p Few rules and procedures are established to govern the process by which the parties conclude their contract. In some countries, procurement laws allow contractin virtually unrestricted freedom to conduct negotiations as they see fit. The laws of ot establish a procedural framework for negotiation designed to maintain fairness and o to bolster competition by encouraging participation of bidders. Provisions on pr selection through negotiation address a variety of issues discussed below, i requirements for approval of the contracting authority's decision to select the c through negotiation, selection of negotiating partners, criteria for comparison and offers, and recording of the selection proceedings.

(a) Approval

102. A threshold requirement found in many countries is that a contracting author approval of a higher authority prior to engaging in selection through negotiation. Su generally require the application for approval to be in writing and to set forth necessitating the use of negotiation. Approval requirements are intended, in particu that the negotiation method of selection is used only in appropriate circumstances.

(b) Selection of negotiating partners

103. In order to make the negotiation proceedings as competitive as possible, it i require the contracting authority to engage in negotiations with as many comp susceptible of meeting the need as circumstances permit. Beyond such a general pr is no specific provision in the laws of some countries on the minimum number of c

suppliers with whom the contracting authority is to negotiate. The laws of some other countries, however, require the contracting authority, where practicable, to negotiate with, or to solicit proposals from, a minimum number of bidders (e.g. three). The contracting authority is permitted to negotiate with a smaller number in certain circumstances, in particular, when less than the minimum number of contractors or suppliers were available.

104. For the purpose of enhancing transparency, it is also advisable to require a notice of the negotiation proceedings to be given to bidders in a specified manner. For example, the contracting authority may be required to publish the notice in a particular publication normally used for that purpose. Such notice requirements are intended to bring the procurement proceedings to the attention of a wider range of bidders than might otherwise be the case, thereby promoting competition. Given the magnitude of most infrastructure projects, the notice should normally contain certain minimum information (e.g. description of the project, qualification requirements) and should be issued in sufficient time to allow bidders to prepare offers. Generally the formal eligibility requirements applicable to bidders in competitive selection proceedings should also apply in negotiation proceedings.

105. In some countries, notice requirements are waived when the contracting authority resorts to negotiation following unsuccessful tendering proceedings (see para. 100), if all qualified contractors or suppliers that submitted tenders are permitted to participate in the negotiations or if no tenders at all were received.

(c) Criteria for comparison and evaluation of offers

106. Another useful measure to enhance transparency and effectiveness of direct negotiations consists of establishing general criteria that proposals are requested to meet (e.g. general performance objectives, output specifications), as well as criteria for comparing and evaluating offers made during the negotiations and for selecting the winning concessionaire (e.g. the technical merit of an offer, tariffs, operating and maintenance costs, the effect of the contract terms on the concessionaire, and the profitability and development potential of the project agreement). The contracting authority should identify the proposals that appear to meet those criteria and engage in discussions with the author of each such proposal in order to refine and improve upon the proposal to the point where it is satisfactory to the contracting authority. The price of each proposal does not enter into those discussions. When the proposals have been finalized, it may be advisable for the contracting authority to seek a best and final offer on the basis of the clarified proposals. It is recommendable that bidders should include with their final offer evidence that the risk allocation that the offer embodies would be acceptable to their proposed lenders. From the best and final offers received, the preferred bidder can then be chosen. The project would then be awarded to the party offering the "most economical" or "most advantageous" proposal. It is recommended that the contracting authority's intention to seek a best and final offer or not should be stated in the invitation to negotiate.

(d) Record of selection proceedings

107. The contracting authority should be required to establish a record of the selection proceedings. The record should include information concerning the circumstances necessitating

the use of negotiation, the contractors or suppliers invited to negotiate, the contractors or suppliers that requested to participate, and the contractors or suppliers that were excluded from participating and the grounds for their exclusion.

E. Unsolicited proposals

108. Government agencies are sometimes approached directly by private companies who submit proposals for the development of projects in respect of which no selection procedures have been opened. These proposals are usually referred to as "unsolicited proposals". Unsolicited proposals may result from the identification by the private sector of an infrastructure need that may be met by a privately financed project. They may also involve innovative proposals for infrastructure management and offer the potential for transfer of new technology to the host country.

109. The main issue raised by unsolicited proposals is whether or not it is advisable to authorize the contracting authority to negotiate unsolicited proposals directly with the bidder or whether unsolicited proposals, too, need to be awarded pursuant to the generally applicable award procedures.

1. Policy considerations

110. One possible reason sometimes cited for waiving the requirement of competitive selection procedures is to provide an incentive for the private sector to submit proposals involving the use of new concepts or technologies to meet the contracting authority's needs. By the very nature of competitive selection procedures, no bidder has an assurance of being awarded the project, unless it wins the competition. The cost of formulating proposals for large infrastructure projects may be a deterrent for companies concerned about their ability to match proposals submitted by competing bidders. In contrast, the private sector may see an incentive for the submission of unsolicited proposals in rules that allow a contracting authority to negotiate such proposals directly with their authors. The contracting authority, too, may have an interest in the possibility of engaging in direct negotiations in order to stimulate the private sector to formulate innovative proposals for infrastructure development.

111. At the same time, however, the award of projects pursuant to unsolicited proposals and without competition from other bidders may expose the Government to serious criticism, particularly in cases involving exclusive concessions. In addition to that, prospective lenders, including multilateral and bilateral financial institutions, may have difficulties in lending or providing guarantees for projects that have not been the subject of competitive selection proceedings. They may fear the possibility of challenge and cancellation by future governments (e.g. because the project award may be subsequently deemed to be the result of favouritism or because the procedure did not provide objective parameters for comparing prices, technical elements and the overall effectiveness of the project) or legal or political challenge by other interested parties, such as customers dissatisfied with increased tariffs or competing companies alleging unjust exclusion from a competitive selection procedure.

112. In the light of the above considerations, it is important for the host country to consider the need for, and the desirability of, devising special procedures for handling unsolicited proposals which deviate from the procedures usually followed for the award of privately financed infrastructure projects. For that purpose, in may be useful to analyse two situations most commonly mentioned in connection with unsolicited proposals, namely: unsolicited proposals claiming to involve the use of new concepts or technologies to address the contracting authority's infrastructure needs, and unsolicited proposals claiming to address an infrastructure need not already identified by the contracting authority.

(a) Unsolicited proposals claiming to involve the use of new concepts or technologies to address the contracting authority's infrastructure needs

113. Generally, for infrastructure projects which require the use of some kind of industrial process or method, the contracting authority would have an interest in stimulating the submission of proposals incorporating the most advanced processes, designs, methodologies or engineering concepts with demonstrated ability to enhance the project's outputs (e.g. by significantly reducing construction costs, accelerating project execution, improving safety, enhancing project performance, extending economic life, reducing costs of facility maintenance and operations, or reducing negative environmental impact or disruptions during either the construction or the operation phase of the project).

114. The contracting authority's legitimate interests might also be achieved through appropriately modified competitive selection procedures instead of a special set of rules for handling unsolicited proposals. For instance, if the contracting authority is using selection procedures which emphasize the expected output of the project, without being prescriptive about the manner in which that output is to be achieved (see paras. 71-72), the bidders would have sufficient flexibility for offering their own proprietary processes or methods. In such a situation, the fact that each of the bidders has its own proprietary processes or methods would not pose an obstacle to competition, provided that all the proposed methods are technically capable of generating the output expected by the contracting authority.

115. Adding the necessary flexibility to the competitive selection procedures may in these cases be a more satisfactory solution than devising special non-competitive procedures for dealing with proposals claiming to involve new concepts or technologies. With the possible exception of proprietary concepts or technologies whose uniqueness may be ascertained on the basis of the existing intellectual property rights a contracting authority may face considerable difficulties in defining what constitutes a new concept or technology. Such determination may require the services of costly independent experts, possibly from outside the host country to avoid allegations of bias. A determination that a project involves a novel concept or technology might also be met by claims from other interested companies also claiming to have appropriate new technologies.

116. However, a somewhat different situation may arise if the uniqueness of the proposal or its innovative aspects are such that it would not be possible to implement the project without using a process, design, methodology or engineering concept for which the proponent or its partners possess exclusive rights, either worldwide or regionally. The existence of intellectual property rights in respect of a method or technology may indeed reduce or eliminate the scope for

meaningful competition. This is why the procurement laws of most countries authorize procuring entities to engage in single-source procurement if the goods, construction or services are available only from a particular supplier or contractor, or the particular supplier or contractor has exclusive rights in respect of the goods, construction or services, and no reasonable alternative or substitute exists (cf. UNCITRAL Model Law, article 22).

117. In such a case, it would be appropriate to authorize the contracting authority to negotiate the execution of the project directly with the proponent of the unsolicited proposal. The difficulty, of course, would be how to establish, with the necessary degree of objectivity and transparency, that there exists no reasonable alternative or substitute to the method or technology contemplated in the unsolicited proposal. For that purpose, it is advisable for the contracting authority to establish procedures for obtaining elements of comparison for the unsolicited proposal.

(b) Unsolicited proposals claiming to address an infrastructure need not already identified by the contracting authority

118. The merit of unsolicited proposals of this type consists of the identification of a potential for infrastructure development which has not been considered by the authorities of the host country. However, in and of itself this circumstance should not normally provide sufficient justification for a directly negotiated project award in which the contracting authority has no objective assurance that it has obtained the most advantageous solution for meeting its needs.

2. Procedures for handling unsolicited proposals

119. In the light of the above considerations, it is advisable for the contracting authority to establish transparent procedures for determining whether an unsolicited proposal meets the required conditions and whether it is in the contracting authority's interest to pursue it.

(a) Restrictions to the receivability of unsolicited proposals

120. In the interest of ensuring proper accountability for public expenditures, some domestic laws provide further that no unsolicited proposal may be considered if the execution of the project would require significant financial commitments from the contracting authority or other governmental agency such as guarantees, subsidies or equity participation. The reason for such a limitation is that the procedures for handling unsolicited proposals are typically less elaborate than ordinary selection procedures and may not ensure the same level of transparency and competition that would otherwise be achieved. However, there may be reasons for allowing some flexibility in the application of this condition. In some countries, the presence of government support other than direct government guarantees, subsidy or equity participation (e.g. the sale or lease of government assets to project proponents) does not necessarily disqualify a proposal from being treated and accepted as an unsolicited proposal.

121. Another condition for consideration of an unsolicited proposal is that it should relate to a project for which no selection procedures have been initiated or announced by the contracting authority. The rationale for handling an unsolicited proposal without using a competitive selection procedure is to provide an incentive for the private sector to identify new or unanticipated

infrastructure needs or formulate innovative proposals for meeting those needs. This justification may no longer be valid if the project has already been identified by the authorities of the host country and the private sector is merely proposing a technical solution different from the one envisaged by the contracting authority. In such a case, the contracting authority could still take advantage of innovative solutions by applying a two-stage selection procedure or by inviting the submission of alternative proposals within the selection procedures originally foreseen (see paras. 60-84). However, it would not be consistent with the principle of fairness in the award of public contracts to entertain unsolicited proposals outside selection proceedings already started or announced.

(b) Procedures for determining the admissibility of unsolicited proposals

122. The company or group of companies who approach the Government with a suggestion for private infrastructure development should be requested to submit an initial proposal containing sufficient information to allow the contracting authority to make a *prima facie* assessment of whether the conditions for handling unsolicited proposals are met, in particular whether the proposed project is in the public interest. The initial proposal should include, for instance, the following information: statement of the proponent's previous project experience and financial standing; description of the project (type of project, location, regional impact, proposed investment, operational costs, financial assessment, resources needed from the Government or third parties); the site (ownership and whether land or other property will have to be expropriated); a description of the service and the works.

123. Following a preliminary examination, the contracting authority should inform the company, within a reasonably short period, whether or not there is a potential public interest in the project. If the contracting authority reacts positively to the project, the company should be invited to submit a formal proposal which, in addition to the items covered in the initial proposal, should contain a technical and economical feasibility study (including characteristics, costs and benefits) and an environmental impact study. Furthermore, the proponent should be required to submit satisfactory information regarding the concept or technology contemplated in the proposal. The information disclosed should be in sufficient detail to allow the contracting authority to properly evaluate the concept or technology and determine whether it meets the required conditions and is likely to be successfully implemented at the scale of the proposed project. The company submitting the unsolicited proposal should retain title to all documents submitted throughout the procedure, and those documents should be returned to it in the event the proposal is rejected.

124. Once all the required information is provided by the proponent, the contracting authority should decide, within a reasonably short period, whether it intends to pursue the project and, if so, what procedure will be used. The choice of the appropriate procedure should be made on the basis of the contracting authority's preliminary determination as to whether or not the implementation of the project would be possible without the use of a process, design, methodology or engineering concept for which the proponent or its partners possess exclusive rights.

(c) Procedures for handling unsolicited proposals which do not involve proprietary concepts or technology

125. If the contracting authority, upon examination of an unsolicited proposal, decides that there is public interest in pursuing the project, but the implementation of the project is possible without the use of a process, design, methodology or engineering concept for which the proponent or its partners possess exclusive rights, the contracting authority should be required to award the project by using the procedures which would be normally required for the award of privately financed infrastructure projects, such as, for instance, the competitive selection procedures described in this *Guide* (see paras. 39-94). However, the selection procedures may include certain special features so as to provide an incentive to the submission of unsolicited proposals. These incentives may consist of the following measures:

(a) The contracting authority could undertake not to initiate selection proceedings regarding a project in respect of which an unsolicited proposal was received without inviting the company that submitted the original proposal;

(b) The original bidder might be given some form of premium for submitting the proposal. In some countries, the premium takes the form of a margin of preference over the final rating (i.e. a certain percentage over and above the final combined rating obtained by that company in respect of both price and non-price evaluation criteria). One possible difficulty of such a system is the risk of setting the margin of preference so high so as to discourage competing meritorious bids, thus resulting in the receipt of a project of lesser value in exchange for the preference given to the innovative proponent. Alternative forms of incentives may include the reimbursement, in whole or in part, of the costs incurred by the original proponent in the preparation of the unsolicited proposal. For purposes of transparency, any such incentives should be announced in the request for proposals.

126. Notwithstanding the incentives that may be provided, the author of the unsolicited proposal should generally be required to meet essentially the same qualification criteria as would be required of the bidders participating in the competitive selection procedure (see paras. 43-46).

(d) Procedures for handling unsolicited proposals involving proprietary concepts or technology

127. If it appears that the innovative aspects of the proposal are such that it would not be possible to implement the project without using a process, design, methodology or engineering concept for which the proponent or its partners possess exclusive rights, either worldwide or regionally, it may be useful for the contracting authority to confirm that preliminary assessment by applying a procedure for obtaining elements of comparison for the unsolicited proposal. One such procedure may consist in the publication of a summary of the essential terms of the proposal with an invitation for other interested parties to submit alternative or comparable proposals within a certain period. The period should be commensurate with the complexity of the project and should afford the prospective competitors sufficient time for formulating their proposals. This may be a crucial factor for obtaining alternative proposals, for example, if the bidders would have to carry

out detailed sub-surface geological investigations which might have been carried out over many months by the original proponent, who would want the geological findings to remain secret.

128. The invitation for comparative or competitive proposals should be published with a minimum frequency (e.g. once every week for three weeks) in at least one newspaper of general circulation. It should indicate the time and place where bidding documents could be obtained and should specify the time during which proposals may be received. It is important for the contracting authority to protect the intellectual property rights of the original proponent and to ensure the confidentiality of proprietary information received with the unsolicited proposal. Any such information should not form part of the bidding documents. Both the original proponent and any other company that wishes to submit an alternative proposal should be required to submit a bid security (see paras. 81-82). Two possible avenues may then be pursued, according to the answers to reactions received to the invitation:

(a) If no alternative proposals are received, the contracting authority may reasonably conclude that there is no reasonable alternative or substitute to the method or technology contemplated in the unsolicited proposal. This finding of the contracting authority should be appropriately recorded and the contracting authority could be authorized to engage in direct negotiations with the original proponent. It may be advisable to require that the decision of the contracting authority be reviewed and approved by the same authority whose approval would normally be required in order for the contracting authority to select a concessionaire through direct negotiation (see para. 102);

(b) If alternative proposals are submitted, the contracting authority should invite all the proponents to competitive negotiations with a view to identifying the most advantageous proposal for carrying out the project (see paras. 103-105). In the event that the contracting authority receives a sufficiently large number of alternative proposals which appear *prima facie* to meet its infrastructure needs, there may be scope for engaging in full-fledged competitive selection procedures, subject to any incentives that may be given to the author of the original proposal (see para. 125 (b)).

F. Review procedures

129. An important safeguard of proper adherence to the rules governing the selection procedure is that bidders have the right to seek review of actions by the contracting authority in violation of those rules. Various remedies and procedures are available in different legal systems and systems of administration, which are closely linked to the question of review of governmental actions. What is crucial is that, whatever the exact form of review procedures, an adequate opportunity and effective procedures for review should be provided. Elements for the establishment of an adequate review system are contained in chapter VI of the UNCITRAL Model Law.

130. Appropriate review procedures should establish in the first place that suppliers and contractors have a right to seek review. In the first instance, that review may be sought from the contracting authority itself, in particular where the project is yet to be awarded. This may facilitate economy and efficiency, since in many cases, in particular prior to the awarding of the project, the contracting authority may be quite willing to correct procedural errors, of which it

may even not have been aware. It may also be useful to provide for a review by higher administrative organs of the Government, where such a procedure would be consistent with constitutional, judicial and administrative structures. Finally, most domestic procurement regimes affirm the right to judicial review, which should generally also be available in connection with the award of infrastructure projects.

131. In order to strike a workable balance between, on the one hand, the need to preserve the rights of bidders and the integrity of the selection process and, on the other hand, the need to limit disruption of the selection process, domestic laws often include a number of restrictions on the review procedures that it establishes. These include: limitation of the right to review to bidders; time limits for filing of applications for review and for disposition of cases, including any suspension of the selection proceedings that may apply at the level of administrative review; exclusion from the review procedures of a number of decisions that are left to the discretion of the contracting authority and that do not directly involve questions of the fairness of treatment accorded to bidders.

132. There exist in most States mechanisms and procedures for review of acts of administrative organs and other public entities. In some States, review mechanisms and procedures have been established specifically for disputes arising in the context of procurement by those organs and entities. In other States, those disputes are dealt with by means of the general mechanisms and procedures for review of administrative acts. Certain important aspects of proceedings for review, such as the forum where review may be sought and the remedies that may be granted, are related to fundamental conceptual and structural aspects of the legal system and the system of State administration in every country. Many legal systems provide for review of acts of administrative organs and other public entities before an administrative body that exercises hierarchical authority or control over the organ or entity (hereinafter referred to as "hierarchical administrative review"). In legal systems that provide for hierarchical administrative review, the question of which body or bodies are to exercise that function in respect of acts of particular organs or entities depends largely on the structure of the State administration. In the context of general procurement laws, for example, some States provide for review by a body that exercises overall supervision and control over procurement in the State (e.g. a central procurement board); in other States the review function is performed by the body that exercises financial control and oversight over operations of the Government and of the public administration. In some States, the review function in respect of particular types of cases involving administrative organs or other public entities is performed by specialized independent administrative bodies whose competence is sometimes referred to as "quasi-judicial". Those bodies are not, however, considered in those States to be courts within the judicial system.

133. Many national legal systems provide for judicial review of acts of administrative organs and public entities. In several of those legal systems judicial review is provided in addition to administrative review, while in other systems only judicial review is provided. Some legal systems provide only administrative review, and not judicial review. In some legal systems where both administrative and judicial review is provided, judicial review may be sought only after opportunities for administrative review have been exhausted; in other systems the two means of review are available as options.

G. Record of selection proceedings

134. In order to ensure transparency and accountability and to facilitate the exercise of the right of aggrieved bidders to seek review of decisions made by the contracting authority, the contracting authority should be required to keep an appropriate record of key information pertaining to the selection proceedings.

135. The record to be kept by the contracting authority should firstly contain, as appropriate, such general information concerning the selection proceedings as is usually required to be recorded for public procurement (e.g. the information listed in article 11 of the UNCITRAL Model Law), including the following:

(a) A description of the project for which the contracting authority requested proposals;

(b) The names and addresses of the companies participating in bidding consortia and the name and address of the members of the bidders with whom the project agreement is entered into;

(c) Information relative to the qualifications, or lack thereof, of bidders; a summary of the evaluation and comparison of proposals including the application of any margin of preference;

(d) The price, or the basis for determining the price, and a summary of the other principal terms of the proposals and of the project agreement;

(e) A summary of any requests for clarification of the preselection documents or the request for proposals, the responses thereto, as well as a summary of any modification of those documents;

(f) If all proposals were rejected, a statement to that effect and the grounds therefor.

136. In addition to the above information, it may be useful to require the contracting authority to include the following information in the record of the selection proceedings:

(a) A summary of the conclusions of the preliminary feasibility studies commissioned by the contracting authority and a summary of the conclusions of the feasibility studies submitted by the qualified bidders;

(b) The list of the preselected bidders;

(c) If changes to the composition of the preselected bidders are subsequently permitted, a statement of the reasons for authorizing such changes and a finding as to the qualifications of the new members or members admitted to the consortia concerned;

(d) If the contracting authority finds most advantageous a proposal other than the proposal offering the lowest unit price for the expected output, a justification of the reasons for such finding by the awarding committee;

(e) If the negotiations with the consortium that submitted the most advantageous proposal and any subsequent negotiations with remaining responsive consortia did not result in a project agreement, a statement to that effect and of the grounds therefor.

137. For selection proceedings involving direct negotiations (see paras. 95-107) it may be useful to include the following information in the record of the selection proceedings:

(a) A statement of the grounds and circumstances on which the contracting authority relied to justify the direct negotiation;

(b) The name and address of the company or companies invited to those negotiations;

(c) If those negotiations did not result in a project agreement, a statement to that effect and of the grounds therefor.

138. For selection proceedings engaged in as a result of unsolicited proposals (see paras. 108-128) it may be useful to include in the record of the selection proceedings the following information, in addition to the information mentioned above:

(a) The name and address of the company or companies submitting the unsolicited proposal and a brief description thereof;

(b) A certification by the contracting authority that the unsolicited proposal was found to be of public interest and involve new concepts or technologies, as appropriate.

139. It is advisable that the rules on record requirements specify the extent and the recipients of the disclosure. Setting the parameters of disclosure involves balancing factors such as: the general desirability, from the standpoint of the accountability of contracting authorities, of broad disclosure; the need to provide bidders with information necessary to permit them to assess their performance in the proceedings and to detect instances in which there are legitimate grounds for seeking review; and the need to protect the bidders' confidential trade information. In view of these considerations, it may be advisable to provide two levels of disclosure, as envisaged in article 11 of the UNCITRAL Model Law. The information to be provided to any member of the general public may be limited to basic information geared to the accountability of the contracting authority to the general public. However, it is advisable to provide for the disclosure for the benefit of bidders of more detailed information concerning the conduct of the selection, since that information is necessary to enable the bidders to monitor their relative performance in the selection proceedings and to monitor the conduct of the contracting authority in implementing the requirements of the applicable laws and regulations.

140. Moreover, appropriate measures should be taken to avoid the disclosure of confidential trade information of suppliers and contractors. That is true in particular with respect to what is

disclosed concerning the evaluation and comparison of proposals, as excessive disclosure of such information may be prejudicial to the legitimate commercial interests of bidders. As a general rule, the contracting authority should not disclose more detailed information relating to the examination, evaluation and comparison of proposals and proposal prices, except when ordered to do so by a competent court.

141. Provisions on limited disclosure of information relating to the selection process would not preclude the applicability to certain parts of the record of other statutes in the enacting State that confer on the public at large a general right to obtain access to Government records. Disclosure of the information in the record to legislative or parliamentary oversight bodies may be mandated pursuant to the law applicable in the host country.

* * *